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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAMON ORTIZ PEREZ, Defendant and Appellant.	H039349 (Santa Clara County Super. Ct. No. CC956273)
In re RAMON ORTIZ PEREZ, on Habeas Corpus.	H042098

A jury convicted defendant Ramon Ortiz Perez of second degree murder (Pen. Code, § 187, 189)[1] and found true the allegations that in the commission of the offense he personally used a deadly or dangerous weapon—a knife (§ 12022, subd. (b)(1)), and that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). Thereafter, the court sentenced defendant to 15 years to life on the murder count consecutive to one year for the personal use of a knife. The court stayed a 10-year term for the criminal street gang enhancement.

Defendant filed a timely notice of appeal.[2]

[1] All further unspecified section references are to the Penal Code.

[2] Defense counsel filed a notice of appeal on February 7, 2013. Thereafter, on February 14, 2013, in propria persona, defendant filed a second notice of appeal.

On appeal, defendant raises numerous challenges to his conviction, which we discuss later. In addition, he has filed a petition for writ of habeas corpus, which this court ordered considered with the appeal. In his petition, defendant argues that he did not receive the effective assistance of counsel and that the cumulative impact of all his counsel's failures requires that this court reverse his conviction and the true finding on the gang enhancement. Finding no prejudicial errors, we shall affirm the judgment and deny the petition for writ of habeas corpus.

Facts Adduced at the Trial

In 2009, when he was just days shy of his 17th birthday, defendant stabbed to death Adam Esparza. At the time defendant was a member of Sur Santos Pride (SSP), a local Sureño street gang. On September 23, 2009, defendant was in a Jack in the Box restaurant in Milpitas with fellow gang member Eduardo Yanez, and Sureño "wannabe," or affiliate, Felipe Luna. Yanez and Luna had worked at a construction site next door and went to the Jack in the Box while their paychecks were being prepared.

Defendant had a three-dot tattoo next to his left eye, which identified him as a Sureño. While defendant and his friends stood and waited for their food, Adam Esparza, a member of a Norteño gang, entered the restaurant with his friend, Robert Lee; they intended to get a soda before going to the movies. Lee was a member of the Crips gang. According to Yanez, Crips are "okay" with both Sureño and Norteño gang members. Lee, who had driven Esparza to the Jack in the Box, parked his car in the adjacent lot, about 30 feet from the restaurant entrance.

Upon entering the restaurant, Lee went to the bathroom while Esparza passed by defendant and his friends who were in line to order. Defendant did not know Esparza personally, but recognized he was a Norteño because he was "wearing a lot of red." Once Esparza saw defendant's three-dot Sureño tattoo, he started laughing and used his hands to "throw the four at" them, i.e., to show them a Norteño gang sign. While heading toward the soda machine, just as he passed defendant and his friends, Esparza said,

"Oh, scrap. Scrap," a derogatory term for Sureños. Yanez described their reaction to the insult as, "we're like, Oh, let him. He's a little kid." Esparza turned and walked past them again; as he left the restaurant he was "mad-mugging" or "mean-mugging," defendant and his friends.[3]

Through the windows, defendant and his friends saw Esparza go to Lee's car parked just to the right of the entrance, open the trunk, and pull something out. Yanez was concerned that Esparza had gone outside to his car to get a weapon. Esparza returned to the restaurant wearing a red hat. Although he never ordered food, Esparza sat in the dining area next to a "short wall" partition, very close to defendant, who stood with Yanez and Luna on the other side waiting for their order. Esparza started laughing, "mad-mugging," and calling defendant "scrap." Defendant stared back and called Esparza "buster," a derogatory term for a Norteño.

According to Yanez, Esparza said something along the lines "What's up, you scrap" and "What are you staring at"; defendant responded, "Fuck that shit. Let's go outside dog." According to an independent eyewitness defendant was saying it's "One-on-one." Defendant went out of the door first and Esparza and their respective friends followed.

A fistfight between defendant and Esparza took place in the handicap parking space behind some planter boxes, just outside the doors of the restaurant. Yanez and Luna stood outside near the restaurant door and watched while Lee stood near his car. Esparza, the larger of the two, started throwing punches; he gave defendant a bloody nose. Shortly after the fight began Esparza caused defendant to fall to the ground. A customer who was in the restaurant described the fight as follows:

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[3] According to defendant, Esparza was looking kind of mad and "kind of making his face . . . like if he was tough."

"A[:] I see one bigger person and one smaller person. The small person kind of, like, went down and, like, lunged at him. The guy—the bigger guy was on top. The victim was on top. So I thought it, like, over already.

"Q[:] Did you see any punches be [*sic*] thrown?

"A[:] Couple punches but not—not really. I mean, the first, I mean couple punches, but I knew from the second—what happened it wasn't going to be a fair—I mean, it was going to be a one-sided fight."

According to Lee, when defendant fell down he tried to pull his butterfly knife out from his pocket, but it fell to the ground; Yanez testified that it just fell out of defendant's pocket during the fight.[4] As soon as Lee saw the knife, he shouted, "He's got a knife. No knives. No knives"; he heard other people say something akin to "[k]eep it clean." Yanez told defendant to put the knife away since it was supposed to remain a one-on-one fistfight that none of the others would have to join. Defendant put the knife back in his pocket and began walking toward his friends who were heading inside the restaurant. Esparza walked toward his car; he taunted defendant for having lost the fight. Defendant shouted back; he too claimed victory. Yanez told defendant, "Let's go fool. It's over. You guys got down. Let's bounce."

Esparza walked toward Lee's car. Lee walked toward the front of the car, while Esparza approached the car from the rear. Defendant walked toward the car. Despite bleeding from his face and having lost the fight, defendant was smiling. Before Lee got to the car, defendant reached through the passenger window and grabbed a pack of cigarettes from the dashboard; he said, "[t]hey're my cigarettes now." Lee, who was by now in front of the car, told defendant that the cigarettes belonged to him. Yanez told

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[4] Initially, Yanez told the police that he never saw a knife, and later, that defendant had pulled out his knife intentionally. Later still, he said that the knife fell inadvertently just after Esparza pulled defendant's shirt up above his waist. Lee remembered that defendant tried to pull a knife from his pocket as he was grappling with Esparza and it dropped to the ground.

defendant to give back the cigarettes because "some Crips are cool with us." Defendant said, "[a]ll right," and threw the cigarettes onto the front of the hood. When asked if defendant appeared angry at that point, Yanez said, "He was kind of mad and—and cool, just in between." Yanez told defendant, "Let's go," and defendant responded, "Yeah. Let's go." Esparza got into the passenger seat of Lee's car while Yanez and Luna went back toward the restaurant to pick up their food; defendant was following them. As defendant headed toward the restaurant, Esparza continued to shout insults through the open passenger window.

Defendant was just at the restaurant entrance, about 30 feet away from Lee's car, when he turned and walked back to where Esparza was sitting in the car. Lee tried to move his car, but another car was blocking him. Defendant reached in through the window and stabbed Esparza quickly and repeatedly with his butterfly knife while Esparza tried to move himself toward the driver's side to get away from the window. According to Lee, during the attack, defendant shouted "sur."[5] Officer Dong described this as a way of "proclaiming who he's affiliated with" while he was stabbing Esparza.

Multiple witnesses described seeing defendant throw rapid punches or quick jabs through the car window before they realized defendant was stabbing Esparza with a knife. Defendant held the knife so that the blade protruded through his fist, between his fingers.

Defendant inflicted two fatal stab wounds to Esparza's heart and lungs in addition to six "defensive wounds," wounds that were consistent with Esparza's attempt to shield himself with his arms and legs. There were long shallow cuts or "incised wounds" to Esparza's hands and arm, plus a stab wound through his leg that exited at his knee.

Once Lee was able to move his car, defendant stopped stabbing Esparza. While backing up, Lee hit the wall behind him; he left the parking lot for the street. Lee drove

[5] According to the investigating office, Officer Dong, Lee told him that it was at the time of the stabbing that defendant shouted "sur."

about three-quarters of a mile away to a construction site on the other side of the street and asked the workers to call an ambulance for Esparza. While Lee was backing up the car, defendant stayed in the lot for a few seconds before running out to the street. Defendant said that he threw the bloody knife onto the freeway when he ran from the restaurant.

After the stabbing, Yanez and Luna remained inside the restaurant to get their food order. Defendant ran across the street to an office complex. Eventually, he emerged and ran across the office complex parking lot toward a grass berm in the street, which was in between the complex and Main Street. The berm was filled with day workers. As he ran toward the workers, defendant kept looking back at the restaurant while ducking down. One witness described defendant as having "a really stupid grin, kind of laugh." When one of the workers looked up, defendant motioned for him to be quiet by putting his finger up to indicate "[s]hush." A witness described defendant as "kind of smiling. Kind of a little nervous but smiling. Kind of laughing." Defendant maintained this expression as he ran "all through the parking lot." The witness told police that defendant had a "smirk on his face" and seemed excited, "like a child who had just misbehaved and was about to get into trouble."

When the police arrived, they asked Yanez to tell them what had happened. Yanez asked the police to arrest him and to exclude his name from any police report so he could tell them what he observed without appearing to be a "snitch." Defendant did not go home that evening; he said that he spent at least some of that time "hiding for a while" at his friend's house.

The day after the stabbing, at 4:45 p.m., police went to defendant's home to obtain a description for a search warrant. They saw defendant's car parked in front of the home. They waited, and followed defendant when he left the house and drove away. Before police could initiate a stop, defendant saw them, pulled over, and waited for them to approach his vehicle before he took off on a high-speed mile-and-a-half chase through a

residential neighborhood that ended when he crashed into a parked car. Defendant abandoned the car; he fled on foot and jumped multiple fences before he broke into a house. He was arrested after he was discovered hiding in a closet.

While defendant was awaiting trial, Yanez was arrested for second degree burglary and placed in custody with other Sureño gang members. While in jail, Yanez was stabbed by Sureño and SSP gang members; he had a "green light" on him, meaning other gang members had to kill him.

Defendant's defense at trial was that he was guilty of the lesser included offense of manslaughter, not murder. Defendant claimed that Esparza had engaged in provocative conduct that triggered him to act impulsively in the heat of passion rather than with malice due to trauma he had suffered as child.[6]

Discussion

Manslaughter Instruction

Just before counsel gave their opening statements, defense counsel sought a ruling from the trial court about whether it would instruct on manslaughter as a lesser included offense of murder if the defense could demonstrate that defendant committed the stabbing as a result of provocation by Esparza.[7] Based on defense counsel's offer of proof, the trial court indicated it was likely to give such an instruction assuming the evidence at trial supported it. The court did instruct on the elements of heat of passion-manslaughter as a lesser included offense of murder pursuant to CALCRIM No. 570 just prior to closing arguments.

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6 When he was in the first or second grade, defendant's father began to hit him to discipline him. His older brother Luis would fight with him—he would kick and punch defendant. When defendant was 14 years old, he was stabbed in the throat. He agreed he became a member of SSP because they were offering "love and acceptance"; he felt "protected" and "untouchable."

7 The prosecutor had filed a motion in limine arguing that the court should not give an instruction on manslaughter because it was unsupported by the evidence. The trial court ruled that it could not make such a determination before hearing the evidence.

In addition to instructing on the elements of heat of passion-manslaughter as a lesser included offense of murder, the trial court referenced manslaughter when it instructed on general principles of homicide pursuant to CALCRIM No. 500. The court instructed on the elements of murder in the first and second degree pursuant to CALCRIM Nos. 520 and 521; and gave the pattern jury instruction on provocation pursuant to CALCRIM No. 522.

CALCRIM No. 522 as given here states: "Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first - or second - degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter."

In addition, to the foregoing, the trial court gave two special instructions pertaining to provocation. The first instruction, "522A" was requested by the defense. It defined provocation as "to cause anger, resentment, or deep feeling in; to cause to take action; to stir action. Provocation may be anything that arouses great fear, anger or jealousy. The provocative conduct may be physical or verbal, and it may be comprised of [*sic*] a single incident or numerous incidents over a period of time."

During the discussion on jury instructions, defendant objected to a second special instruction on provocation, "522B," requested by the prosecutor, contending it was duplicative and argumentative. However, the trial court overruled the objection. The court noted that the instruction was consistent with the law as stated in *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303 (*Johnston*), which addressed the circumstance in which a defendant is an "initial aggressor." Noting that the defense had earlier objected to the words, "initial aggressor," the trial court stated that the term "in my mind, had morphed into the person who starts a fight. And then, on reflection, I looked at the language in *People versus Johnston*, and . . . they use instigates the fight. So I

thought that that was more in keeping with what that case was saying. So I changed the language I had originally proposed to the person who instigates a fight."

The trial court instructed the jury with "522B"; the court told the jury that a "person who instigates *a fight* cannot claim the benefit of provocation as to reduce murder to manslaughter." (Italics added.)

Defendant contends that in so instructing the jury the court "violated [his] right[s] to trial by jury and to a fair trial under the U[nited] S[tates] and California Constitutions." Defendant argues that "by instructing the jury that it could not find [him] guilty of manslaughter rather than murder if it determined he provoked the fight, the court prevented the jury from considering evidence that, regardless of who provoked the fight, [defendant] killed while in the heat of passion for which Esperanza [*sic*] was culpably responsible, and therefore [his] crime was manslaughter. In so doing, the court simultaneously: (1) prevented the jury from deciding a factual question raised by the evidence, (2) substantially undermined [defendant]'s capacity to present a defense, and (3) failed to correctly instruct jurors on the lesser included offense of manslaughter." We are not persuaded.

Murder is the unlawful killing of a human being with malice. (§ 187.) A defendant who commits an intentional and unlawful killing lacks malice when the defendant acts as a result of a sudden quarrel or heat of passion. (*People v. Moye* (2009) 47 Cal.4th 537, 549 (*Moye*).) Such heat of passion or provocation is a theory of " 'partial exculpation' " that reduces murder to manslaughter by negating the element of malice. (*Ibid.*)

"The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively." (*People v. Steele* (2002) 27 Cal.4th 1230, 1252 (*Steele*).) " ' "To satisfy the objective or 'reasonable person' element of this form of voluntary

manslaughter, the accused's heat of passion must be due to 'sufficient provocation.' " ' " (*Moye*, *supra*, 47 Cal.4th at p. 549.) "The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*Moye*, *supra*, at p. 550.) Since the test of sufficient provocation is an objective one, a defendant's particular susceptibilities are irrelevant. (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 83 (*Oropeza*).) " '[N]o defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.' [Citation.]" (*Steele*, *supra*, at pp. 1252-1253.)

A trial court is required to instruct the jury on " 'all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request.' " (*People v. Rogers*(2006) 39 Cal.4th 826, 866-867 (*Rogers*).) This sua sponte duty extends to instructions on manslaughter as a lesser included offense where there is evidence that the defendant acted upon sudden quarrel or heat of passion, negating malice. (*People v. Breverman* (1998) 19 Cal.4th 142, 154, 162-164.)

As can be seen, the court instructed the jury on the lesser included offense of heat-of-passion manslaughter. Defendant's challenge appears to be with the giving of special instruction 522B.

"Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.]" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088 (*Ramos*).) The determination is based on " 'the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' " (*People v. Carrington* (2009) 47 Cal.4th 145, 192.) In other words, the correctness of jury instructions is determined from the entire charge by the trial court and not from consideration of part or parts of an instruction. (*People v. Musselwhite* (1998)

17 Cal.4th 1216, 1248.) " 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible [of] such interpretation.' [Citation.]" (*Ramos, supra*, at p. 1088.) We assume the jurors are intelligent persons capable of understanding and correlating all jury instructions given to them. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.)

As noted, the court delivered the standard jury instruction on voluntary manslaughter based on heat of passion provided in CALCRIM No. 570. Defendant makes no claim that there was anything improper in CALCRIM No. 570. However, the court added special instruction 522B on provocation, which finds its roots in *Oropeza, supra,* 151 Cal.App.4th 73. As noted, the court told the jury that "[a] person who instigates a fight cannot claim the benefit of provocation as to reduce murder to manslaughter." In *Oropeza, supra,* 151 Cal.App.4th at p. 83, the court stated: "A defendant may not provoke a fight, become the aggressor, and, without first seeking to withdraw from the conflict, kill an adversary and expect to reduce the crime to manslaughter by merely asserting that it was accomplished upon a sudden quarrel or in the heat of passion."

Even though *Oropeza* addressed the need to instruct on voluntary manslaughter in light of the evidence, it correctly stated the legal effect that a defendant's aggression may have on his or her ability to claim that a killing occurred as a result of heat of passion. The law on this point was clarified and succinctly summarized by Justice Epstein in *Johnston, supra,* 113 Cal.App.4th at p. 1313, where the court concluded that a defendant who taunted his victim into a fight was "culpably responsible" for the altercation and not provoked by the victim even though the victim physically charged the defendant and the two engaged in mutual combat. Instruction 522B—"The person who instigates a fight cannot claim the benefit of provocation as to reduce murder to manslaughter"—is a correct statement of law. (*Johnston, supra,* 113 Cal.App.4th at pp. 1312-1313.)

Instruction on law relevant to whether defendant or his victim was the initial aggressor was appropriate. Defendant claimed and testified that Esparza had instigated the attack by taunting him in the restaurant but there was contrary evidence showing that defendant initiated both the fistfight and the stabbing. (*Rogers*, *supra*, 39 Cal.4th at p. 866 [the trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request].) Thus, the trial court committed no error in giving a correct instruction on the applicable law. (*People v. Carter* (1993) 19 Cal.App.4th 1236, 1252 (*Carter*) [prosecution's special instruction that was a correct statement of the law and made no reference to specific evidence]; accord, *People v. Debose* (2014) 59 Cal.4th 177, 205 (*Debose*)[trial court's modified instruction].)

Defendant claims that as a factual matter, the evidence demonstrated that Esparza was the aggressor who provoked defendant to commit manslaughter, not murder. Defendant's conclusion, however, was an issue for the jury to decide, and since, as just noted, there was evidence to support a contrary conclusion, the trial court did not err when it provided a neutral instruction on the relevant law. (*Rogers*, *supra*, 39 Cal.4th at p. 866; *Carter*, *supra*, 19 Cal.App.4th at p. 1252; *Debose*, *supra*, 59 Cal.4th at p. 205.)

Defendant claims that if the jurors assumed defendant initiated the fistfight, then the 522B instruction prevented them from determining whether defendant killed while in heat of passion *after* the fistfight had ended. We are not persuaded. Taking the instructions together as we must, (*People v. Carrington*, *supra*, 47 Cal.4th at p. 192) the jurors were provided with appropriate instruction on how to evaluate the evidence to determine whether defendant acted out of heat of passion or whether sufficient time had passed to obviate. We must presume that the jurors understood and followed the Court's instruction.

Jurors were instructed with CALCRIM No. 570, which as given here told the jurors that they "must decide whether the defendant was provoked and whether the

provocation was sufficient . . . . [¶] If enough time passed between the provocation and the killing for a person of average disposition to cool off and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis." Moreover, defendant's requested special instruction, "522A," noted specifically that "provocative conduct may be physical *or* verbal, and *it may* [*be*] *comprised of* [*sic*] a *single incident or numerous incidents over a period of time*." (Italics added.) The plain language of the definition does not limit provocative conduct to a fight, nor does it preclude multiple provocations arising from "numerous incidents over a period of time" constituting "physical or verbal" conduct. Thus, read as a whole, the instructions did not bar jurors from considering whether defendant had cooled off after the fight and been provoked anew, or indeed, whether he had instigated a new altercation after the fistfight. (*Carrington*, *supra*, 47 Cal.4th at p. 192; *Ramos*, *supra,* 163 Cal.App.4th at p. 1088.) If defendant's quarrel is with the word "fight" in the instruction, it was incumbent upon him to request a specific limitation or modification.

On the premise that the jury was prevented from deciding a factual issue, defendant claims the instructional error was prejudicial in violation of his state constitutional right to due process and federal constitutional right to a jury trial and to present a defense. However, as noted *ante*, the jurors were not prevented from deciding a factual issue. The special instruction did not require that the jury determine, based on its view of the evidence, that defendant was the provocateur, and it did not require the jury to accept the defense theory that it was Esparza who provoked the fight that led to his death. Defendant has not shown that it impaired the jury's ability to determine whether Esparza's conduct was sufficiently provocative to cause a reasonable person to act in the heat of passion and kill in response. (See *Moye*, *supra*, 47 Cal.4th at p. 551.)

Even if this court assumed for the sake of argument that the court erred in instructing with special instruction 522B, we would find the error harmless under any standard of review. Defendant's claim of provocation is based on his view that after the

fistfight was over he was "ceaselessly derided and humiliated" with taunts such as "ha, ha ha, that's right. Got your ass whipped. Fuck you. That's why you got dropped. Fuck you, mother fucker . . . got your ass whipped . . . I beat you up, that's why you are bleeding from your nose, you pussy ass," and was called "scrap," "the pejorative term used [to] denote Sureno gang members." He asserts that having been punched repeatedly in the head and face, hurt, dizzy, and bleeding, he was extremely vulnerable to provocation and in a poor condition to exercise judgment.

Even though the trial court allowed the jury to consider whether defendant was provoked by this name calling, it need not have done so. On the evidence presented, the court would have been justified in refusing to instruct on the effect of heat of passion altogether. While the name calling following the fight might have satisfied the subjective component of heat of passion-manslaughter as defendant so testified,[8] it could not satisfy the objective component of heat of passion-manslaughter. Name calling does not constitute legally sufficient provocation that would cause an ordinarily reasonable person to become sufficiently enraged that he or she could kill someone. (*People v. Najera* (2006) 138 Cal.App.4th 212, 226, fn. 2 [victim's name calling and pushing defendant to the ground are not sufficiently provocative under an objective standard to cause an ordinary person of average disposition to act rashly or without due deliberation]; *People v. Manriquez* (2005) 37 Cal.4th 547, 586 [the victim called the defendant a mother fucker and taunted him by repeatedly asserting that if the defendant had a weapon, he should take it out and use it. Held, such declarations plainly were insufficient to cause an average person to become so inflamed as to lose reason and judgment; the trial court properly denied defendant's request for an instruction on voluntary manslaughter based upon the theory of a sudden quarrel or heat of passion]; *People v. Enraca* (2012) 53 Cal.4th 735, 759 (*Enraca*) [insults or gang-related challenges induce insufficient

[8] Defendant testified that he had never been humiliated in this way before or suffered this sort of derisive attack on his manhood in a fight before.

provocation to merit instruction].) As noted, the victim's conduct must have been sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*Moye, supra*, 47 Cal.4th at pp. 549-550.) "The standard is not the reaction of a 'reasonable gang member.' " (*Enraca, supra*, at p. 759.)

In sum, special instruction 522B did not interfere with the presentation of defendant's defense to the jury, nor did it reduce the prosecution's burden of proof to establish malice. It did not prevent the jury from deciding a factual question raised by the evidence and was a correct instruction on the law.

Gang Testimony

The prosecution's gang expert, Officer Gallardo, testified generally about Norteño and Sureño gangs, their signs and symbols, the historical foundations of each gang, and how they cultivate fear in their neighborhoods. He opined that in October 2009 there were 240 SSP members in Santa Clara County; that they are a formal group with a common name, sign and symbol; and that their primary activity crimes are robbery and assault with a deadly weapon.

Officer Gallardo explained to the jury that some SSP members are active, some are not. Some people are simply associates who have not been jumped into the gang as members. Gang tattoos are worn to display membership in a gang and to instill fear and respect. As soon as gang members see each other, they size up the other person. If they cannot tell whether a person is in a gang, they will approach the person and ask.

According to Officer Gallardo, defendant was contacted by San Jose police in 2006. Defendant had a three-dot gang tattoo and was in the company of Roger Sanchez, a member of another Sureño gang. Wearing the tattoo without having been jumped into the gang and thereby becoming a gang member leads to being assaulted. Being jumped into a Sureño gang entails taking a 13-second assault by multiple gang members. Police contacted defendant in May 2007. He was associating with gang members. On

January 31, 2008, police contacted defendant and he stated he was in SSP and they noted three dots tattooed on his left wrist.

In the county jail, individuals are segregated by gang membership; otherwise they would assault each other. When defendant was taken to the Santa Clara County jail, he identified himself as a Sureño.[9] To drop out of a gang while in custody, one must be debriefed and then effectively segregated in protective custody. Defendant had not asked for such status. To leave the gang in jail requires being a "snitch," which could risk the person's life. Based on tattoos, field information cards, and investigation of defendant, Officer Gallardo believed defendant to be an active gang member; he opined that the killing was committed to enhance the reputation of the gang.

Officer Gallardo stated that the entirety of his knowledge of the gang to which defendant belonged was based on police reports he had read.

Before Officer Gallardo testified, defense counsel objected to his testimony on the ground that he lacked sufficient knowledge about defendant's gang. The court overruled the objection and found Officer Gallardo qualified as an expert on Hispanic criminal street gangs.

Defendant claims that admitting Officer Gallardo's testimony violated his right to confront adverse witnesses. Specifically, defendant argues that the court violated his

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9 Recently, in *People v. Elizalde* (2015) 61 Cal.4th 523 (*Elizalde*), the California Supreme Court held that classification interviews that take place while a defendant is booked into jail constitute custodial interrogation for purposes of *Miranda*. (*Id.* at p. 527, 530-540.) The Supreme Court explained that "Gang affiliation questions do not conform to the narrow exception contemplated in [*Rhode Island v.*] *Innis* [(1980) 446 U.S. 291] and [*Pennsylvania v.*] *Muniz* [(1990) 496 U.S. 582] for basic identifying biographical data necessary for booking or pretrial services. Instead, they must be measured under the general *Innis* test, which defines as 'interrogation' questions the police should know are 'reasonably likely to elicit an incriminating response.' [Citation.]" (*Elizalde, supra,* at p. 538.) We do not know under what circumstances defendant identified himself as a Sureño.

Sixth Amendment right to confront witnesses against him by admitting testimonial hearsay.

Defendant claims that since the law at the time of trial appeared to permit this practice, i.e., that intermediate appellate courts have rejected confrontation clause violation claims on this basis, it would have been futile to preserve his claim through objection.[10] Lastly, he claims that the testimony, notwithstanding its relevance to the charged enhancement or the circumstances surrounding the crime, should have been excluded as unduly inflammatory.

i. Confrontation Clause

An expert may offer an opinion if the subject is sufficiently beyond common experience and the opinion would assist the trier of fact. (Evid.Code, § 801, subd. (a).) In general, the testimony of a gang expert meets this test. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) Beyond the foregoing, expert opinion must be "[b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates[.]" (Evid.Code, § 801, subd. (b).) Under the Evidence Code, an expert may rely on hearsay such as conversations with gang members and information gained from law enforcement colleagues and agencies. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 618-619 (*Gardeley*).) Nevertheless, currently, the ability of an expert to rely on hearsay without implicating the confrontation clause concerns is in a state of flux.[11]

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10 Since defendant raises the issue of ineffective assistance of counsel because counsel did not object on this ground, we choose to consider the case on the merits. (*People v. Neely* (2009) 176 Cal.App.4th 787, 795 [an appellate court may choose to consider the case on the merits when a claim of ineffectiveness of counsel is raised].) We thus address the merits of defendant's arguments.

11 We note that the California Supreme Court has granted review on this issue in *People v. Sanchez*, review granted May 14, 2014, S216681.

As is relevant here, there are two broad categories of hearsay evidence: testimonial and nontestimonial. The United States Supreme Court has explained the distinction in the context of police questioning. "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington* (2006) 547 U.S. 813, 822; *Michigan v. Bryant* (2011) 562 U.S. 344 (*Bryant*) [the most important instances in which the confrontation clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial].)

In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the court held that when nontestimonial hearsay is at issue, the confrontation clause does not bar it. Similarly, the confrontation clause does not "bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. [Citation.]" (*Id.* at pp. 59-60, fn. 9.) However, testimonial hearsay to prove the truth of the matter asserted is not permissible unless the declarant is unavailable and the accused has had a prior opportunity to cross-examine the declarant. (*Ibid*., p. 68.)

Crawford does not undermine the established rule that experts can testify to their opinions on relevant matters and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion. (*People v. Sisneros* (2009) 174 Cal.App.4th 142, 153-154, (*Sisneros*).)

In *Gardeley*, *supra*, 14 Cal.4th 605, the California Supreme Court explained that expert testimony may be "premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions" and "even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony"; and "because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion." (*Id.* at p. 618.) *Gardeley* concluded that a gang expert, in opining that an assault in which the defendant participated was gang related, properly relied on and revealed an otherwise inadmissible hearsay statement by one of the defendant's alleged cohorts that he, the alleged cohort, was a gang member. (*Id.* at pp. 611-613, 618-619.) In reaching this conclusion, *Gardeley* reasoned that it was proper for the expert to reveal the alleged cohort's hearsay statement, because the hearsay evidence or statement *was not offered for its truth* and was properly allowed under Evidence Code section 802. (*Gardeley*, *supra*, at pp. 618-619.)

Nevertheless, subsequent developments in the law require us to examine the continuing precedential value of *Gardeley* as it relates to this confrontation clause issue.

In *Williams v. Illinois* (2012) 567 U.S. __ [132 S.Ct. 2221] (*Williams*), "the prosecution called an expert who testified that a DNA profile produced by an outside laboratory . . . matched a profile produced by the state police lab using a sample of the [defendant's] blood." (*Id*. at p. __ [132 S.Ct. at p. 2227]. (plur. opn. of Alito, J.).) In the plurality opinion, Justice Alito stated that "[o]ut-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which [an] opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." (*Id*. at p. __ [132 S.Ct. at p. 2228] (plur. opn. of Alito, J.).) Alternatively, Justice Alito wrote that confrontation clause concerns were not implicated because the

profile was "very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions[ ] that the Confrontation Clause was originally understood to reach." (*Ibid*.) Moreover, the profile was obtained before any suspect was identified and it was "sought not for the purpose of obtaining evidence to be used against [the defendant], who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose." (*Ibid*.) According to Justice Alito, the profile was not "inherently inculpatory." (*Ibid*.) Also, the use of DNA evidence to exonerate people who have been wrongfully accused or convicted is well known. "If DNA profiles could not be introduced without calling the technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable. [Citation.] The Confrontation Clause does not mandate such an undesirable development. This conclusion will not prejudice any defendant who really wishes to probe the reliability of the DNA testing done in a particular case because those who participated in the testing may always be subpoenaed by the defense and questioned at trial." (*Ibid*.)

Justice Thomas concluded that the confrontation clause was not violated, but for very different reasons; he offered a separate, concurring analysis. He concluded that the disclosure of the outside laboratory's out-of-court statements by means of the expert's testimony did not violate the Confrontation Clause because it "lacked the requisite 'formality and solemnity' to be considered ' "testimonial" ' " for purposes of the confrontation clause. (*Williams, supra,* 567 U.S. at p. __ [132 S.Ct. at p. 2255] (conc. opn. of Thomas, J.).) Justice Thomas opined that "there was no plausible reason for the introduction of [the] statements other than to establish their truth." (*Id*. at p. __ [132 S.Ct. at p. 2256] (conc. opn. of Thomas, J.).) The remaining four justices joined in a dissent authored by Justice Kagan; they rejected the idea that the expert's testimony was not offered for its truth. (*Id*. at pp. __ [132 S.Ct. at pp. 2265, 2268] (dis. opn. of

Kagan, J.).) Due to Justice Thomas's concurring opinion, Justice Kagan asserted that "Five Justices specifically reject every aspect of [the plurality's] reasoning and every paragraph of its explication." (*Id*. at p. __ [132 S.Ct. at p. 2265] (dis. opn. of Kagan, J.).)

After *Williams*, the California Supreme Court analyzed confrontation clause issues in *People v. Lopez* (2012) 55 Cal.4th 569 (*Lopez*), *People v. Dungo* (2012) 55 Cal.4th 608 (*Dungo*) and *People v. Rutterschmidt* (2012) 55 Cal.4th 650 (*Rutterschmidt*). All three cases involved witnesses who testified about technical reports that they did not prepare. (*Lopez*, *supra*, at p. 573 [a laboratory analyst testified regarding a blood-alcohol level report prepared by a colleague]; *Dungo*, *supra*, at p. 612 [a pathologist testified regarding the condition of the victim's body as recorded in an autopsy report prepared by another pathologist]; *Rutterschmidt*, *supra*, at p. 659 [a laboratory director testified that his analysts had detected the presence of alcohol and sedatives in the victim's blood].) In *Lopez*, the court found no confrontation clause violation because the critical portions of the report regarding the defendant's blood-alcohol level were not made with "the requisite degree of formality or solemnity to be considered testimonial." (*Lopez*, *supra*, at p. 582.) The *Dungo* court declined to find a confrontation clause violation because the "criminal investigation was not the *primary* purpose for the autopsy report's description of the condition of [the victim's] body; it was only one of several purposes. . . . The autopsy report itself was simply an official explanation of an unusual death, and such official records are ordinarily not testimonial." (*Dungo*, *supra*, at p. 621.) The confrontation clause issue in *Rutterschmidt* was not reached because the court concluded that the evidence of guilt was overwhelming and any error was harmless beyond a reasonable doubt. (*Rutterschmidt*, *supra*, at p. 661.)

In *Lopez*, our Supreme Court looked at the fractured *Williams* opinion and explained that "all nine high court justices agree that an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution." (*Lopez*, *supra*, 55 Cal.4th at p. 582.) However, this rule sheds very little

light on whether a gang expert can provide an opinion that is based on hundreds of different pieces of information, especially given the reality that gang experts often rely on a mixture of knowledge gained through personal observations and investigations, nontestimonial hearsay, and testimonial hearsay. In other words, a gang expert's opinion is likely based at least in part on matter that raises no confrontation clause concerns. Moreover, practically speaking there is a distinction between a scientific or medical expert relying on a report versus a gang expert relying on multiple sources. With respect to a report involving DNA, blood-alcohol levels, or an autopsy, the prosecution could simply call the person who prepared the report to testify. On the other hand, in a gang case, it is safe to assume that it would be totally impractical for the prosecution to call all the sources of testimonial hearsay to the stand to lay the foundation for the expert's opinion. Moreover, if a defense attorney must inquire into every piece of information relied upon by a gang expert, and if a trial court must then determine whether the expert's opinion is adequately supported by personal knowledge and nontestimonial hearsay, every gang allegation would result in a time-consuming trial within a trial. Furthermore, undoubtedly from a defendant's perspective such confrontation would be futile and counterproductive; we can envision a situation where a parade of tattoo-sporting gang members are called to the stand to testify (or plead the 5th) that they are in fact members of a defendant's gang and have committed various felony offenses. For these reasons, it is not at all apparent whether ultimately our Supreme Court will reevaluate its *Gardeley* decision.

Although the California Supreme Court decision concluding that this type of evidence is not admitted for its truth was reached before the United States Supreme Court reconsidered the confrontation clause in *Crawford*, *supra*, 541 U.S. 36, since the time of that reconsideration, as can be seen in *Williams*, such a conclusion has been called into doubt. We as an intermediate appellate court are required to follow *Gardeley*; and other courts have concluded based on *Gardeley* that the evidence on which an expert relies is

properly admitted since it is offered to evaluate the expert's opinion and not for its truth. (See e.g. *Sisneros, supra,* 174 Cal.App.4th at pp. 153-154.)

In short, we must follow *Gardeley* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) and therefore reject defendant's confrontation clause challenge to Officer Gallardo's expert testimony.

ii. Due Process

In a related argument, defendant contends that the admission of the gang expert's testimony deprived him of a fair trial since the testimony was highly inflammatory and the prosecution's case was questionable.

"[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*. [Citations.]" (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

"To prove a deprivation of federal due process rights, [defendant] must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial. 'Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must "be of such quality as necessarily prevents a fair trial." [Citations.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.' [Citation.] 'The dispositive issue is . . . whether the trial court committed an error which rendered the trial "so 'arbitrary and fundamentally unfair' that it violated federal due process." [Citation.]' [Citation.]" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229-230 (*Albarran*).)

In *Albarran,* two Hispanic males shot guns at a house. Though there was substantial evidence that the sole defendant was a gang member, there was no evidence as to the identity of the other individual. (*Albarran, supra,* 149 Cal.App.4th at pp. 217-219.) Prior to trial, the court ruled that the proffered gang evidence was relevant not only to the gang enhancement but also to the issues of motive and intent for the

underlying charges. (*Id*. at p. 220.) The jury found the defendant guilty of the charged offenses and found the gang enhancement allegations true. (*Id*. at p. 222.) However, the trial court later found that there was insufficient evidence to support the gang findings and they were dismissed without prejudice. (*Ibid*.) *Albarran* held that, even if some of the gang evidence was relevant to the issues of motive and intent, other inflammatory gang evidence was admitted that was not relevant to the charged offenses. (*Id*. at pp. 227-228.) The *Albarran* court stated: "Certain gang evidence, namely the facts concerning the threat to police officers, the Mexican Mafia evidence and evidence identifying other gang members and their unrelated crimes, had no legitimate purpose in this trial. . . . From this evidence there was a real danger that the jury would improperly infer that whether or not [the defendant] was involved in these shootings, he had committed other crimes, would commit crimes in the future, and posed a danger to the police and society in general and thus he should be punished." (*Id*. at p. 230.)

Accordingly, the *Albarran* court concluded that the case was "one of those *rare and unusual* occasions where the admission of evidence . . . violated federal due process and rendered the defendant's trial fundamentally unfair." (*Albarran, supra*, 149 Cal.App.4th at p. 232, italics added.)

Defendant argues that the gang expert's testimony "was admitted and the jury was instructed expressly to consider gang evidence to decide the central questions in this case: whether [defendant] killed in the heat of passion, and relatedly [*sic*], whether his testimony should be credited. [¶] Thus, the . . . highly questionable and inflammatory matter about [defendant]'s gang, the nature of [defendant]'s links to the gang and the conduct of its members, affected the jurors' determinations: [defendant] was a member, and had been for several years, of a criminal street gang that stems from the Mexican Mafia prison gang." We are not convinced that the gang expert's testimony resulted in an unfair trial.

First, Officer Gallardo's testimony was directly relevant to proving the gang enhancement, which the jury found true beyond a reasonable doubt. (See *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051-1052 (*Hernandez*) [no sua sponte duty to give limiting instruction on gang evidence, which jury could consider for gang enhancement].) "It is difficult to imagine a clearer need for expert explication than that presented by a subculture in which this type of mindless retaliation promotes 'respect.' " (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1384 (*Olguin*).)

Furthermore, defendant, who sported a three-dot gang tattoo around his eye, made no efforts to conceal his gang membership, and indeed, he admitted his membership when he testified. It appears that defendant's claim is, in essence, that the prosecutor was precluded from using gang evidence to argue motive. Such a position is contrary to law. (*Hernandez, supra,* 33 Cal.4th at p. 1049 [gang evidence admissible for motive even when gang enhancement not alleged].)

Defendant relies on two cases that are inapposite to support his premise that using gang evidence for the inadmissible purpose of impugning character will not be saved by the permissible purpose of demonstrating motive. (*People v. Cruz* (1964) 61 Cal.2d 861, 868 [reasonableness of search and seizure of marijuana]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [erroneous admission of prior convictions of nonparty not bearing on truthfulness].) Similarly, *Albarran, supra,* 149 Cal.App.4th at p. 230 is distinguishable since in that case, there was *no* evidence suggesting the crime was committed for a gang-related motive other than gang affiliation of the defendant. In defendant's case, essentially, the "gang overtones" (e.g., red hat, name calling, "mean-mugging," etc.) were undisputed.

Defendant does not identify any particular part of the gang expert's testimony that he finds objectionable as inflammatory. Defendant's membership in a gang was not in dispute as defendant admitted that he was a Sureño and member of SSP. More importantly, defendant's expert witness, Dr. Minagawa, assumed that fact and assumed

that Sureños and Norteños were rival gangs and acknowledged that he was "familiar with the gang overtones of this case" before he opined about defendant's attack on Esparza. Dr. Minagawa referred to the initiation process in which gang members are "jumped in," consistent with Yanez's description of the initiation ritual and defendant's testimony of how he joined the gang. When asked if a person with a three-dot face tattoo was indicative of a Sureño "hard-core gang member," Dr. Minagawa responded, "Certainly more entrenched. Absolutely." Based on the evidence, defense counsel argued in closing that after defendant was stabbed he had "no choice but to become part of a gang."

Nearly all of the evidence on gangs and gang culture provided by Officer Gallardo duplicated testimony of other witnesses, including defendant himself. Yanez, defendant, and defendant's expert, Dr. Minagawa, described the significance of tattoos. Further, Dr. Minagawa talked about gang territory. Yanez explained about phrases, symbols, color, and graffiti including those pertaining to "sur" the numbers "3" or "13". Even defendant testified to the meaning of "Sur Trece." Yanez testified specifically that defendant's face tattoo signaled his membership in SSP, acknowledging it as "a walking billboard." Yanez talked about Sureño-Norteño violent confrontations, and even Dr. Minagawa conceded that violent confrontations increase respect and not only are an accepted part of gang culture, but are encouraged. Far more incriminating than Officer Gallardo's opinion was defendant's own testimony about gangs and his role in the crime.

Defendant argues that the prosecutor used Officer Gallardo's testimony to shift the jurors' focus from his actual state of mind at the time of the stabbing to his gang membership. He asserts that the prosecutor repeatedly insisted to the jury that his gang membership demonstrated that he acted with malice aforethought, and the prosecutor maintained at several points that crediting the heat of passion defense would amount to granting him special dispensation from the law based on his gang membership. Defendant fails to explain how this made his trial fundamentally unfair.

Expert testimony is appropriate to demonstrate the tendency of gang members to engage in violent behavior and can be used to provide evidence that *allows* the jury to make a permissible inference of the specific intent to further criminal street gang activity. (*Gardeley*, *supra*, 14 Cal.4th at p. 619.) Moreover, "[c]ases have repeatedly held that it is proper to introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent. [Citations.]" (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1518.)

Plainly, here, the evidence of gang membership and activity was relevant to defendant's motive for attacking Esparza and his intent in so doing. Since there were permissible inferences that the jury could draw from the evidence, defendant's due process right to a fair trial was not violated.

Since we have addressed defendant's claims that Officer Gallardo's testimony was inadmissible because it was predicated on testimonial hearsay, we need not address his ineffective assistance of counsel claim.

Gang Evidence Instruction

The court instructed the jurors with CALCRIM No. 1403, to consider gang evidence for the limited purpose pertaining to elements of the gang enhancement, motive, heat of passion, and witness credibility.

In full, the court told the jurors, "You may consider evidence of gang activity only for the purpose of proving or disproving the elements of the allegation contained in Penal Code section 186.22 and whether the defendant acted with the intent, purpose, and knowledge that are required to prove the gang related enhancement. [¶] *Also, you may consider evidence of gang activity to decide whether the defendant had or did not have a motive to commit the crime charged and whether or not the defendant acted in the heat of passion.* [¶] You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and the information relied on by an expert witness in reaching their opinions. [¶] You may not consider this evidence

for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime."

Defendant claims that the portion of the pattern instruction that permitted consideration of gang evidence to determine whether he acted in the heat of passion was erroneous and violated his constitutional rights to due process.

Respondent argues that defendant's claim of instructional error is barred under the doctrine of invited error as counsel stipulated to the instruction being given. We are not convinced that the record demonstrates that counsel intentionally caused the trial court to err, or that counsel acted for tactical reasons and not out of ignorance or mistake. (See, *People v. Coffman* (2004) 34 Cal.4th 1, 49 [the doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the defendant cannot be heard to complain on appeal. However, it must be clear that counsel acted for tactical reasons and not out of ignorance or mistake. In cases involving an action affirmatively taken by defense counsel, we have found a clearly implied tactical purpose to be sufficient to invoke the invited error rule].) Accordingly, we will address this issue.

Defendant claims that instructing the jury that the jury could consider gang evidence in determining whether he acted in the heat of passion resulted in him being tried based on irrelevant and inflammatory character evidence.

Again, we set forth the law relevant to this issue. "Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' " (*Ramos*, *supra*, 163 Cal.App.4th at p. 1088.) The determination is based on " 'the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' " (*Carrington*, *supra*, 47 Cal.4th at p. 192.) In other words, the correctness of jury instructions is determined from the entire charge by the trial court and not from consideration of part or parts of an instruction. (*People v.*

Musselwhite, *supra*,17 Cal.4th at p. 1248.) " 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' " (*Ramos*, *supra*, at p. 1088.) We assume the jurors are intelligent persons capable of understanding and correlating all jury instructions given them. (*People v. Guerra* (2006*)* 37 Cal.4th 1067, 1148.) When a criminal defendant alleges instructional error, our standard of review is de novo. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 274-280.)

The instruction, with which defendant takes issue, gives the jury the option to consider evidence of gang activity in deciding whether the defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related crimes, enhancements, and special circumstance allegations charged, and it has been held to be "neither contrary to law nor misleading." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1168 (*Samaniego*).)

In essence, defendant claims that the jury had to determine whether he acted in the heat of passion without using gang evidence. He cites no authority for such a proposition, other than the general rule that evidence of a defendant's criminal disposition[12] is inadmissible to prove he or she committed a specific crime. (Evid.Code, § 1101, subd. (a).) Correctly, defendant has stated the general rule regarding character evidence, but he has not shown that CALCRIM No. 1403 permitted the jury to use gang evidence in a way the instruction pointedly *says it should not be used*.

CALCRIM No. 1403 states in no uncertain terms that gang evidence is inadmissible to prove character, or that the defendant is a bad person or has a criminal propensity. It allows such evidence to be considered only on the issues germane to the gang-related crimes and enhancements. (*Samaniego*, *supra*, 172 Cal.App.4th at p. 1168; cf. also *People v. Garcia* (2008) 168 Cal.App.4th 261, 275; *People v. Martinez* (2003)

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12 Defendant uses the words "criminal proclivity" but we assume that he is referring to criminal disposition.

113 Cal.App.4th 400, 413.) Thus, contrary to defendant's claim, evidence of SSP's claimed territory, the gang's primary activities, notions of gang loyalty, respect, and backup were all relevant to determine his intent with respect to the charged crimes and his claim of heat of passion.

We see nothing in CALCRIM No. 1403 that would have forced the jury to find that defendant did not act in the heat of passion because he was affiliated with a criminal street gang. CALCRIM No. 1403 permits but does not require or direct jurors to consider gang evidence for the limited purposes stated. (See *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 189 [instruction barring permissive inference of guilt unless there is slight corroboration does not invite "irrational inference" of guilt].)

In sum, we reject defendant's challenge to CALCRIM No. 1403 as given in this case.

Ineffective Assistance of Counsel

Defendant claims that he received ineffective assistance of counsel because his attorney failed to request a jury instruction that "the hearsay recited by Officer Gallar[d]o could be considered only to assess the validity of his opinions and not for its truth . . . ."

The standard for evaluating a claim of ineffective assistance of counsel is well established. It requires a two-prong showing that counsel's representation was deficient based on an objective standard under prevailing professional norms, and that defendant was prejudiced by the deficient representation under a reasonable probability standard. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-696 (*Strickland*).) Absent a given reason, a court cannot presume incompetence, and the claim must be rejected on appeal. (*People v. Huggins* (2006) 38 Cal.4th 175, 206; *People v. Babbitt* (1988) 45 Cal.3d 660, 707.)

In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel

on appeal unless there could be no conceivable reason for counsel's acts or omissions. (*People v. Earp* (1999) 20 Cal.4th 826, 896.)

Nevertheless, a reviewing court need not assess the two *Strickland* factors in order; and if the record reveals that the defendant suffered no prejudice, we may decide the issue of ineffective assistance of counsel on that basis alone. (*Strickland*, *supra*, 466 U.S. at p. 697.) If it is easier to dispose of an ineffective assistance of counsel claim on the ground of lack of sufficient prejudice that course should be followed. (*Ibid*.)

Assuming for the sake of argument that defense counsel should have requested an instruction, we find no prejudice.

Defendant's defense was that he committed heat-of-passion manslaughter and not murder, and that joining a gang shortly after he was stabbed was evidence of the "complex trauma" that he suffered that made him impulsively react to what he perceived was provocation. The defense did not dispute that defendant was a gang member. Moreover, defense counsel sought to introduce much of the same evidence about gangs through its own expert who "rel[ied] heavily on police reports, interrogation, that sort of thing,"—the same kind of evidence that defendant now claims required his counsel to request a limiting instruction.

Dr. Minagawa, who had testified as a gang expert on at least 70 occasions, expressed no doubt that defendant's assumed gang membership involved a criminal street gang. Moreover, he agreed that the initial conflict between defendant and Esparza was gang motivated.

In addition, SSP gang member Yanez testified about being stabbed in jail by fellow SSP members, and testified that SSP gang members regularly committed assaults to defend their territory.

There was no question that defendant was heavily involved in gang-related activities. Defendant testified that twice he ran away from "the Ranch," a juvenile detention facility, and refused to comply with drug treatment conditions. Defendant

testified, "Just around that time, I was already a Sureño. And all the programs they were sending me to was, [*sic*] like, nothing but Norteños. So, I mean, I couldn't be there, you know." Defendant acknowledged that his tattoos were gang related, and that he obtained them so the gang "would give me more drugs and, like, show me more, like, love, like, like I said." In addition to the overwhelming testimony on the issue, the prosecution introduced abundant physical evidence of the gang indicia seized from defendant's home and photographs of his numerous gang-related tattoos.

Finally, contrary to his assertion, evidence of defendant's guilt was overwhelming. His defense, which included his own testimony, was weak, further undermining any claim of prejudice. Without doubt, far more incriminating than Officer Gallardo's opinion was defendant's own testimony about gangs and his role in the crime.

In sum, defendant has failed to convince this court that he was prejudiced by his counsel's failure to request an instruction that the jury could consider the hearsay recited by Officer Gallardo only to assess the validity of his opinions and not for its truth.

Cross Examination of Officer Gallardo

On direct examination, Officer Gallardo testified that he had concluded that defendant killed Esparza to advance the interests of defendant's gang based on defendant having yelled "sur." On cross examination, defense counsel asked Officer Gallardo if he had read defendant's statement to the police.

"[Defense counsel] Now, when you arrived at your conclusions, you said that you also reviewed [defendant]'s statements; is that right?

"[Officer Gallardo] Correct.

"[Defense counsel] You reviewed his entire transcript; right?

"[Officer Gallardo] Yes.

"[Defense counsel] And you're aware, then that [defendant] told the police—"

The prosecutor objected and the parties approached the bench. In a recorded bench conference, the prosecutor stated that the "fact that he relied upon it doesn't make

it admissible. She—she doesn't get to . . . back door his statement." The court agreed and stated that "it's got to be reliable hearsay. The defendant's statements, when he's on trial, are not reliable. So I am going to sustain the objection."

The next day the court revisited this issue and defense counsel told the court that the question she wanted to ask Officer Gallardo was, "Well, isn't it true that [defendant] told the police back in September 24th of 2009 that he didn't know what had happened? And isn't it true that he said he wasn't thinking clearly? And isn't true that he said that he was mad? And isn't it true that he said that he was pretty pissed off? And isn't it true that he said that he wasn't thinking?"

Defendant argues that barring cross-examination of Officer Gallardo about evidence he rejected in determining that defendant killed Esparza to advance the gang violated his right to cross-examine witnesses.

"Cross-examination—described by Wigmore as ' "the greatest legal engine ever invented for the discovery of truth" ' [citations]—has two purposes. Its chief purpose is 'to test the credibility, knowledge and recollection of the witness. [Citations.] [¶] The other purpose is to elicit additional evidence.' [Citations.] Because it relates to the fundamental fairness of the proceedings, cross-examination is said to represent an 'absolute right,' not merely a privilege [citations], and denial or undue restriction thereof may be reversible error. [Citation.]" (*Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 733.) Since cross-examination implements the constitutional right of confrontation, a trial court should give the defense wide latitude to cross-examine a prosecution witness to test credibility. (*People v. Cooper* (1991) 53 Cal.3d 771, 816.)

Nevertheless, trial courts retain the authority to restrict cross-examination. (*People v. Harris* (1989) 47 Cal.3d 1047, 1091.) "The confrontation clause 'guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' [Citations.]" (*People v. Clair* (1992) 2 Cal.4th 629, 656, fn. 3; see also *People v. Cooper*, *supra*, 53 Cal.3d at

p. 817.) " 'Thus, unless the defendant can show that the prohibited cross-examination would have produced "a significantly different impression of [the witnesses'] credibility" [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment.' [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 494; see also *People v. Brown* (2003) 31 Cal.4th 518, 545-546.)

Furthermore, even if the court abuses its discretion by restricting cross-examination, the error is subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18 "based on factors such as: 'the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.' [Citations.]" (*People v. Sully* (1991) 53 Cal.3d 1195, 1220.)[13]

Although Officer Gallardo opined that defendant stabbed Esparza to benefit the criminal street gang, Dr. Mingawa testified that there were two explanations for the stabbing. He explained that one was to benefit the gang, that defendant was "beaten down" and "humiliated" and he could not stand that and retaliated to show he was not a weak person for the gang. The other explanation was that he reacted emotionally after being beaten down, he reacted "to the personal insult and attacked the victim"—"just reacting personally." When asked by defense counsel what he had considered to find that the one explanation—that defendant reacted emotionally—was more reasonable, Dr. Mingawa stated that when he read the report of defendant's interrogation by the

[13] We assume for the sake of this argument that the court erred in restricting defense counsel from cross examining Officer Gallardo on things he had discounted in forming his opinion that defendant stabbed Esparza to benefit his gang. However, in defendant's next argument that the court "violated" Evidence Code section 721, we conclude that the court did not abuse its discretion in preventing defense counsel from eliciting defendant's out-of-court statements to the police about what he was thinking when he stabbed Esparza.

police, defendant said "he wasn't thinking"; he did not say "I was thinking about how my gang was going to perceive this." Thus, defense counsel was able to elicit from Dr. Mingawa the very essence of the testimony that she wanted to elicit from Officer Gallardo.

Officer Gallardo was not an important prosecution witness; the jury was free to reject his testimony (CALCRIM No. 332 [opinions of experts must be considered, but the jury is not required to accept them as true or correct]) and accept Dr. Minagawa's testimony that the stabbing was not done for the benefit of defendant's gang, but because he reacted emotionally on a personal level. Since defense counsel was able to elicit the evidence of what defendant said about the stabbing from Dr. Minagawa, eliciting the same evidence from Officer Gallardo would have been cumulative. Furthermore, given the strength of the prosecution's case on the gang overtones surrounding the stabbing, there was ample evidence from which the jury could find that the stabbing was committed for the benefit of a criminal street gang—defendant's entire encounter with Esparza, a stranger, involved gang-related taunting before it culminated in the stabbing.

Accordingly, we find the court's restriction on defense counsel's cross-examination of Officer Gallardo harmless beyond a reasonable doubt.

Evidence Code Section 721

As noted, Officer Gallardo opined that defendant stabbed Esparza to advance defendant's gang. This conclusion was inconsistent with defendant's defense that he stabbed Esparza in the heat of passion. Thus, defendant argues, in sustaining the prosecutor's hearsay objection to defense counsel's attempt to elicit defendant's statement to the police about what he remembered regarding the stabbing "violated" Evidence Code section 721.

Evidence Code section 721, subdivision (a) provides: "Subject to subdivision (b), a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his or her qualifications,

(2) the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion." In turn Evidence Code section 721, subdivision (b) provides: "If a witness testifying as an expert testifies in the form of an opinion, he or she may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless any of the following occurs: [¶] (1) The witness referred to, considered, or relied upon such publication in arriving at or forming his or her opinion. [¶] (2) The publication has been admitted in evidence. [¶] (3) The publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. [¶] If admitted, relevant portions of the publication may be read into evidence but may not be received as exhibits."

In essence, defendant argues that under Evidence Code section 721, subdivision (a)(3) defense counsel should have been allowed to cross examine Officer Gallardo on the matter on which his opinion was based and the reasons for the opinion, including whether he considered matters inconsistent with his opinion.

Defendant cites no case, and our research has found none, where it has been held that a court "violated" Evidence Code section 721 in precluding cross examination of an expert witness on a defendant's out-of-court statements.

Under Evidence Code section 721, a witness who testifies as an expert may, of course, be cross-examined to the same extent as any other witness. While the scope of cross-examination is "broad," (*People v. Doolin* (2009) 45 Cal.4th 390, 434) it is not boundless. Defendant's statements to the police related to the specific events at issue in the trial, and were directly relevant to the charge of murder and the defense theory that defendant acted in the heat of passion. "Evidence Code section 352 authorizes the court to exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value. [Citation.]" (*People v. Montiel* (1993) 5 Cal.4th 877, 919.) Defendant's statement to the police was

self-serving. Under Evidence Code section 1252, which provides that a statement is inadmissible "if the statement was made under circumstances such as to indicate its lack of trustworthiness," the court was correct in preventing defense counsel from getting defendant's statements before the jury; defendant's out-of-court statements were unreliable.

Contrary to defendant's contention, Evidence Code section 721 does not compel the admission of extrajudicial statements of a defendant or override the trial court's traditional discretionary authority to weigh the probative value of evidence against the potential for prejudice. (See *People v. Chatman* (2006) 38 Cal.4th 344, 376.)

In sum, we reject defendant's assertion that the court erred in preventing defense counsel from cross-examining Officer Gallardo about evidence he rejected in determining that defendant stabbed Esparza to advance his gang.

Defendant's Admission

As noted, according to Lee, defendant yelled "sur" at the time of the stabbing. As respondent explains, while defendant did not dispute his gang membership or that he and Esparza exchanged gang-related insults before the stabbing, he denied any memory of events surrounding the stabbing, whereas Lee reported that in fact defendant yelled "sur." Defendant's gang comment was inculpatory with regard to the charged gang enhancement.

CALCRIM No. 358 instructs the jury to "[c]onsider with caution any statement made by the defendant tending to show his guilt unless the statement was written or otherwise recorded." It appears that it was not given in this case. Further, it appears that defendant did not request such an instruction.

Defendant contends and respondent agrees that the court erred in failing to instruct the jury that defendant's admission must be viewed with caution. Respondent contends, however, that defendant did not suffer reversible prejudice.

At the time of defendant's trial, the courts had a sua sponte duty to give this instruction whenever a defendant's out-of-court admissions were at issue. (*People v. Diaz* (2015) 60 Cal.4th 1176, 1184-1185 (*Diaz*).)

The *Diaz* court held that there is no longer a sua sponte duty to give CALCRIM No. 358 in any case where the issue arises. (*Diaz*, *supra*, 60 Cal.4th at p. 1190.) However, the *Diaz* court declined to decide whether its elimination of the sua sponte rule for CALCRIM No. 358 was retroactive. (*Diaz*, *supra*, at p. 1195.) The *Diaz* court concluded that the trial court's failure to give the instruction was harmless because it was not reasonably probable the jury would have reached a more favorable result had it been given. (*Id*. at pp. 1195-1196.)

We need not decide whether the elimination of the sua sponte rule for CALCRIM No. 358 is retroactive because, in this case, we conclude that the trial court's failure to give the instruction was harmless in that it is not reasonably probable the jury would have reached a more favorable result had it been given. (*Diaz*, *supra*, 60 Cal.4th at p. 1195 [applying the *People v. Watson* (1956) 46 Cal.2d 818, 835-836 (*Watson*) standard, rather than the more stringent standard of review for federal constitutional error].)

We examine the record to see whether there was a conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately. (*People v. Dickey* (2005) 35 Cal.4th 884, 905.)

Defendant admitted stabbing Esparza, but claimed no memory of the words exchanged during the stabbing; and his defense was that he acted in the heat of passion and not to benefit his gang. Thus, in essence he denied saying "sur."

Where there is no conflict in the evidence, but simply a denial by the defendant that he made the statements attributed to him, the failure to give the cautionary instruction is harmless. (*People v. Dickey*, *supra*, 35 Cal.4th at p. 906.)

Furthermore, the instructions provided by the trial court concerning witness credibility informed the jury of the need to evaluate the witnesses' testimony for possible inaccuracies and determine whether the statement was in fact made. The jury was instructed with CALCRIM No. 226, which sets out the numerous factors the jury may consider in deciding whether a witness's testimony is credible. As our Supreme Court explained in *People v. McKinnon* (2011) 52 Cal.4th 610, "when the trial court otherwise has thoroughly instructed the jury on assessing the credibility of witnesses, we have concluded the jury was adequately warned to view their testimony with caution." (*Id.* at p. 680.) We so conclude in this case.

Insufficient Evidence that SSP is a Criminal Street Gang

Defendant claims there was insufficient evidence that he belonged to a criminal street gang, defined in section 186.22, subdivision (f) "having as one of its primary activities the commission of one or more" of the enumerated offenses in subdivision (e). Defendant claims the evidence was insufficient by limiting the street gang to defendant's specific Sureño sub-pod, SSP; and by asserting that the testimony of the prosecution's gang expert, Officer Gallardo, was the sole evidence that SSP was a gang.

The "criminal street gang" component of a gang enhancement requires proof of three elements: (1) an ongoing association involving three or more participants, having a common name or common identifying sign or symbol; (2) *that the group has as one of its* "*primary activities*" *the commission of one or more specified crimes;* and (3) the group's members either separately or as a group have engaged in a "pattern of criminal gang activity." (§ 186.22, subd. (f), italics added; see *Gardeley*, *supra*, 14 Cal.4th at p. 617.)

Defendant attacks the second element; he alleges that the evidence that the primary activities of the gang were enumerated offenses consisted of Officer Gallardo's "bald assertion" that gang members commit crimes that are listed in section 186.22.

As with substantive offenses, the same substantial evidence standard applies when determining whether the evidence is sufficient to sustain a jury's finding on a gang

enhancement. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1456-1457; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322.) The trier of fact may rely upon expert testimony about gang culture and habits to reach a finding on the gang allegation. (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322, [the prosecution may rely on expert testimony to establish the required elements of the gang enhancement].)

Defendant contends the evidence was no better than that rejected in *In re Alexander L.* (2007) 149 Cal.App.4th 605.

In *In re Alexander L., supra,* 149 Cal.App.4th 605 (*Alexander L.*), the court held that the gang expert's testimony lacked foundation and was insufficient to support the primary activities element. The officer testified only to general offenses committed by the gang, and to a predicate offense in which the alleged gang member was actually acquitted of the gang allegation. (*Id.* at pp. 611-612.) A second predicate offense involved a gang member involved in an assault, but no direct link was made as to how the offense was connected to the gang. (*Id.* at pp. 612-613.) More importantly, the officer's testimony concerning the predicate offenses did not have an adequate foundation. The officer did not explain how he knew about the offenses. (*Id.* at p. 612.) On cross-examination, the officer conceded that the vast majority of cases relating to the gang involved graffiti, but he failed to specify whether the incidents involved misdemeanor or felony vandalism. (*Ibid.*) Consequently, the appellate court concluded that there was insufficient evidence that the "primary activities" prong essential to proving the existence of a criminal street gang had been established. (*Id.* at pp. 611-612.)

As explained in *People v. Martinez* (2008) 158 Cal.App.4th 1324 (*Martinez*), the gang expert in *Alexander L.* "never specifically testified about the primary activities of the gang. He merely stated 'he "kn[e]w" that the gang had been involved in certain crimes. . . . He did not directly testify that criminal activities constituted [the gang's] primary activities.' [Citation.]" (*Martinez, supra,* at p. 1330.)

On appeal, we must view the evidence disclosed by the record in the light most favorable to the judgment below. (*People v. Elliot* (2005) 37 Cal.4th 453, 466.) Here, when asked if there were one or more primary-activity specific crimes, Officer Gallardo responded, "Correct." When asked what they were, Officer Gallardo misunderstood the question and related many of the crimes that can be found in section 186.22, subdivision (e). However, when asked about the crimes specific to SSP, Officer Gallardo testified that their pattern crimes are "assault with a deadly weapon" and "robbery." Thus, a fair reading of the record indicates that Officer Gallardo was opining that the primary activities of SSP were robbery and assault with a deadly weapon. The uncorroborated testimony of a single witness is sufficient to sustain a conviction. (*People v. Gammage* (1992) 2 Cal.4th 693, 700.)

Officer Gallardo's opinion was based upon documentary evidence that (1) Ruben Ramirez, an SSP gang member was convicted of assault with a deadly weapon (§ 245, subd. (a)) in case No. CC802856—an enumerated crime (§ 186.22, subd. (e)(1); and (2) Gonzalo Robles Rodriguez, an SSP gang member was convicted of six counts of second degree robbery (§§ 211, 212.5) in case No. CC899927 committed for the benefit of the gang—robbery being another enumerated crime (§ 186.22, subd. (e)(2)).

Officer Gallardo testified that he had talked to gang members, personally investigated gang-related crimes, reviewed reports of gang-related crimes and cases, attended monthly meetings to keep current with gang trends, reviewed field identification cards, and consulted with other experts in the field. As a patrol officer, he spent at least 100 hours investigating Sureño gangs. As a result of his investigations and research, Officer Gallardo knew the number of SSP members in Santa Clara County (240 as of October 2009) and SSP's association with the fleur de lis symbol and New Orleans Saints sports gear. He testified that he had looked at pattern activities or crimes for SSP. He knew the specific boundaries of SSP "territory."

In contrast to the testimony offered by the gang expert in *Alexander L.*, Officer Gallardo's testimony was supported by evidence establishing his expertise in the investigation of gang crimes, and by documentary evidence of two specific gang crimes committed by SSP members prior to the commission of the charged offense. In addition to the two prior gang crimes, the charged homicide, another enumerated crime (§ 186.22, subd. (e)(3)—which Officer Gallardo, based upon substantial evidence, opined was a gang-related attack by an SSP member (defendant) against a perceived Norteño—could also have been considered in finding that one of the primary activities of SSP was the commission of one or more of the offenses enumerated in section 186.22, subdivision (e). (*Sengpadychith, supra,* 26 Cal.4th at p. 323.)

Discerning and proving what among a group's activities constitute its "*primary* activities" (§ 186.22, subd .(f), italics added) is a general inquiry. "The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. . . . [¶] Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute," which may be shown by expert testimony. (*Sengpadychith, supra,* 26 Cal.4th at pp. 323-324.)

Defendant's challenge to Officer Gallardo's ability to identify and enumerate SSP's primary activities amounts, in essence, to a challenge to his qualifications as an expert on the SSP gang.[14] We find, however, that Officer Gallardo was amply qualified to testify concerning SSP's primary activities, having interviewed gang members, personally investigated approximately 50 gang-related crimes, reviewed reports of gang-related crimes and cases, attended monthly meetings to keep current with gang trends,

[14] We note that defendant did object to Officer Gallardo's qualification as an expert on Sureño gangs in general and SSP in particular. The court overruled the objection.

reviewed field identification cards, and consulted with other experts in the field. The trier of fact could reasonably draw the inference that Officer Gallardo based his opinion about SSP's primary activities on his history of interviews and investigations. (See *People v. Crittenden* (1994) 9 Cal.4th 83, 139 [reviewing court must presume in support of judgment every fact reasonably inferable from the evidence].) In addition, as specific examples bolstering his opinion that SSP's primary activities included prohibited crimes, Officer Gallardo identified two SSP members, one who had been convicted of multiple counts of robbery, and one who had been convicted of assault with a deadly weapon, which as noted *ante* are enumerated as predicate crimes in section 186.22, subdivision (e).

In sum, the circumstances involved here are dissimilar to those presented in *Alexander L.*, and we conclude that there was sufficient evidence presented in this case from which the jury could conclude that SSP was a criminal street gang whose primary activity was the commission or attempted commission of robbery and assault with a deadly weapon.

Failure to Find Each Element of the Gang Allegation

Defendant claims that the trial court omitted certain elements when it instructed jurors on the elements of the gang enhancement. Specifically, he claims that jurors should have been instructed on the definition of a criminal street gang and the primary activities in which such a gang must engage.[15] He is correct that CALCRIM No. 1401, as provided to the jury, omitted a significant portion of the instruction that defines a criminal street gang as a group of three or more people with a common name or identifying sign or symbol, that engages in a pattern of criminal activity.

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15 It appears that the jury was provided with two instructions numbered CALCRIM No. 1401. During the reading of the instructions, after a bench conference, the court told the jurors that they needed only one of the two instructions and should remove the one that started "If you find."

Of relevance here, CALCRIM No. 1401 provides: "If you find the defendant guilty of the crime[s] charged in Count[s] [,] [or of attempting to commit (that/those crime[s])][,][or the lesser offense[s] of <*insert lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant committed that crime (for the benefit of[,]/ at the direction of[,]/ [or] in association with) a criminal street gang. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.] [¶] . . . [¶] To prove this allegation, the People must prove that: [¶] 1. The defendant (committed/ [or] attempted to commit) the crime (for the benefit of[,]/ at the direction of[,]/ [or] in association with) a criminal street gang; [¶] AND [¶] 2. The defendant intended to assist, further, or promote criminal conduct by gang members. [¶] <*If criminal street gang has already been defined.*> [¶] [A criminal street gang is defined in another instruction to which you should refer.] [¶] <*If criminal street gang has not already been defined in another instruction.*> [¶] [A *criminal street gang* is any ongoing organization, association, or group of three or more persons, whether formal or informal: [¶] 1. That has a common name or common identifying sign or symbol; [¶] 2. That has, as one or more of its primary activities, the commission of <*insert one or more crimes listed in* Pen. Code, § 186.22(e)(1)-(25), (31)-(33)>; [¶] AND [¶] 3. Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity. [¶] In order to qualify as a *primary* activity, the crime must be one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of the group. [¶] . . . [¶] [To decide whether the organization, association, or group has, as one of its primary activities, the commission of <*insert felony or felonies from* Pen. Code, § 186.22(e)(1)-(25), (31)-(33)> please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].] [¶] A *pattern of criminal gang activity*, as used here, means:

1. [The] (commission of[,]/ [or] attempted commission of[,]/ [or] conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of): [¶] <*Give Alternative 1A if the crime or crimes are in* Pen. Code, § 186.22(e)(1)-(25), (31)-(33).> [¶] 1A. (any combination of two or more of the following crimes/[,][or] two or more occurrences of [one or more of the following crimes]:) <*insert one or more crimes listed in* Pen. Code, § 186.22(e)(1)-(25), (31)-(33)>" (CALCRIM No. 1401.) The underlined portion of the instruction was completely omitted from the instructions in this case.

A trial court's failure to instruct on an element of a sentence enhancement that does not increase the statutorily prescribed maximum penalty for the underlying crime "must on appeal be evaluated under*Watson*, *supra*, 46 Cal.2d at p. 836." (*Sengpadychith*, *supra*, 26 Cal.4th at p. 326), "which asks whether without the error it is 'reasonably probable' the trier of fact would have reached a result more favorable to the defendant." (*Id*. at pp. 320-321, fn. omitted.)[16]

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[16] "For certain specified felonies punishable by a determinate term of imprisonment, the criminal street gang enhancement increases the punishment for the offense to an indeterminate term of imprisonment for life. (§ 186.22, subd. (b)(4).) For all other felonies punishable by a determinate term of imprisonment, the enhancement adds a separate term of imprisonment 'in addition and consecutive to' the punishment otherwise prescribed for the felony. (§ 186.22, subd. (b)(1) . . . .) Thus, in these two categories, the gang enhancement increases the sentence for the underlying crime beyond its statutory maximum. In these instances, therefore, a trial court's failure to instruct on an element of the gang enhancement is federal constitutional error [citation], reviewable under the harmless error standard of *Chapman*, *supra*, 386 U.S. at page 24. . . ." (*Sengpadychith*, *supra*, 26 Cal.4th at p. 327, italics omitted.) However, "The gang statute has a third category of felony offenses—those that are punishable by an indeterminate term of imprisonment for life. For these felonies, the gang enhancement provision does not alter the indeterminate term of life imprisonment; it merely prescribes the minimum period the defendant must serve before becoming eligible for parole. (§ 186.22, subd. (b)(5) [providing for this category of felonies committed to benefit a street gang, the defendant 'shall not be paroled until a minimum of 15 calendar years have been served'].) Thus, for these felonies, the gang enhancement provision does not increase the life term for the underlying offense. Consequently, in this category of cases instructional

Here the jury convicted defendant of one count of murder and found that the offense was committed for the benefit of and in association with a criminal street gang. The offense of murder falls within the gang statute's category of offenses punishable by an indeterminate term of imprisonment for life. (§ 186.22, subd. (b)(4)). Therefore, for these offenses, instructional error of the type at issue in this case is subject to this court's harmless error test in *Watson, supra*, 46 Cal.2d at page 836. (*Sengpadychith, supra*, 26 Cal.4th at p. 328.)

Accordingly, we ask the following question. If the jury had been instructed that a criminal street gang is any ongoing organization, association, or group of three or more persons, whether formal or informal; that has a common name or common identifying sign or symbol; and that has, as one or more of its primary activities, the commission of one or more crimes listed in section 182.22, subdivision (e); and whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity, is it reasonably probable the jury would have found the gang enhancement to be untrue?

Here the prosecution satisfied the statutory requirements through the gang expert testimony of Officer Gallardo. His qualified expert testimony presented evidence—that was not contradicted—that SSP was an ongoing organization or association with approximately 240 active members, that it has a common name (SSP) or common identifying sign or symbol—the fleur de lis and New Orleans Saints sports gear—and that there were at least two predicate offenses that resulted in criminal convictions of SSP members. Moreover, undoubtedly robbery and assault with a deadly weapon are among the enumerated offenses in section 186.22, subdivision (e). Given the foregoing, it is not

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error on an element of the gang enhancement provision does not violate the federal Constitution [citation], but only California law, making the error reviewable under the standard . . . articulated in *Watson, supra*, 46 Cal.2d 818, 836 . . . ." (*Sengpadychith, supra*, 26 Cal.4th at p. 327, italics omitted.)

reasonably probable the trier of fact would have reached a result more favorable to defendant if it had been instructed correctly with the definition of a criminal street gang and the list of enumerated felonies in section 186.22, subdivision (e).

Moreover, Yanez testified that SSP was a street gang and that it had as one of its symbol the Saints logo. Furthermore, during cross-examination of Officer Gallardo the following exchange between defense counsel and Officer Gallardo took place.

"Q[:] So you mentioned that . . . you consider SSP as a formal gang.

"A[:] Yes.

"Q[:] Now, what do you mean by formal?

"A[:] Well, they're a group of three or more people, with a common name, common sign, common symbol, and they commit the crimes basically pointed out in 186.22.

"Q[:] Okay. So you're describing the definition of a criminal street gang.

"A[:] Correct."

In sum, given the foregoing, we have no doubt that the jury would have found SSP was a criminal street gang and that its primary activity was the commission of one or more of the enumerated crimes in section 186.22, subdivision (e) had the jury been properly instructed.

Cumulative Error

Defendant contends that he "has shown the trial court erroneously instructed jurors that if he provoked a fight, he could not be convicted of manslaughter rather than murder, that inflammatory testimonial hearsay about [defendant]'s gang and his gang activities was improperly admitted, that jurors were not instructed that such evidence could not be considered for its truth, and that instead they were erroneously instructed, in substance, to consider this evidence as probative of [defendant]'s criminal disposition, that the trial court wrongly barred counsel from cross-examining the expert about one of the most central issues in the case and that it erroneously failed to instruct jurors to view admissions with caution." He argues that while "each of these errors is of federal

constitutional dimension and each of these errors requires reversal of [his] convictions, taken together they resulted in a fundamentally unfair trial, and the federal Constitution's guarantee of due process requires a new trial as a result of this cumulative error."

"The concept of finding prejudice in cumulative effect, of course, is not new. Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial. [Citations.]" (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) Certainly, " '[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.)

Under some circumstances, several errors that are each harmless on their own should be viewed as prejudicial when considered together. (*People v. Hill* (1998) 17 Cal.4th 800, 844.) Since we have found none of defendant's claims of error meritorious or prejudicial, a cumulative error argument cannot be sustained. No serious errors occurred, which whether viewed individually or in combination, could possibly have affected the jury's verdict. (*People v. Martinez* (2003) 31 Cal.4th 673, 704; *People v. Valdez* (2004) 32 Cal.4th 73, 128.) To put it another way, since we have found no substantial error in any respect, defendant's claim of cumulative prejudicial error must be rejected. (*People v. Butler* (2009) 46 Cal.4th 847, 885.)

Defendant's Writ Petition

In his writ petition defendant claims that his counsel was ineffective in stipulating that the jury could consider gang evidence in determining whether he killed in the heat of passion; and in the event that we find he forfeited his claim that the prosecution's gang expert's testimony violated his right to confront witness against him, his counsel was ineffective in failing to raise a confrontation clause objection. Again he asserts that counsel was ineffective in failing to request an instruction that the hearsay evidence recited by the gang expert could be considered solely to evaluate the validity of the

officer's opinion. Finally, defendant contends that the cumulative impact of counsel's failings requires that his conviction and the true finding on a gang enhancement be reversed.

Stipulating to a Jury Instruction on Heat of Passion

The court instructed the jurors with CALCRIM No. 1403, to consider gang evidence for the limited purpose pertaining to elements of the gang enhancement, motive, *heat of passion*, and witness credibility.

As noted, *ante*, in full, the court told the jurors, "You may consider evidence of gang activity only for the purpose of proving or disproving the elements of the allegation contained in Penal Code section 186.22 and whether the defendant acted with the intent, purpose, and knowledge that are required to prove the gang related enhancement. [¶] *Also you may consider evidence of gang activity to decide whether the defendant had or did not have a motive to commit the crime charged and whether or not the defendant acted in the heat of passion.* [¶] You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and the information relied on by an expert witness in reaching their opinions. [¶] You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime."

According to defense counsel, she stipulated to the giving of this instruction. She states that she did so because she was concerned that the jury would misuse the evidence, but she did not request that the court edit CALCRIM No. 1403 so that it did not permit the jury to consider the gang testimony in deciding whether defendant had acted in the heat of passion. She claims this was not a strategic decision, but an oversight on her part.

Defendant asserts that his counsel was ineffective in stipulating that the jury could consider the gang testimony in deciding whether he acted in the heat of passion because it authorized the jury to infer that his association with a criminal organization and thereby

his criminal nature inclined him to have not suffered the impaired judgment of heat of passion.

It is worth reiterating that to prevail on an ineffective assistance of counsel claim, defendant must establish two things: (1) the performance of his or her counsel fell below an objective standard of reasonableness, and (2) prejudice occurred as a result. (*Strickland*, *supra*, 466 U.S. at p. 687; *People v*. *Hernandez* (2012) 53 Cal.4th 1095, 1105.) The *Strickland* court explained prejudice as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, *supra*, at p. 694.) Further, the high court stated "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceeding. (*Ibid*.)

In this instance, *Strickland*'s first prong comes into play—whether counsel's performance fell below an objective standard of reasonableness.

In essence, defendant's claim of ineffective assistance of counsel rests on an assertion that the jury had to determine whether he acted in the heat of passion without using gang evidence. In his petition, as in his appeal, he cites no authority for such a proposition. Moreover, the instruction gives the jury the option to consider evidence of gang activity in deciding whether defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related crimes, enhancements, and special circumstance allegations charged, and it has been held to be "neither contrary to law nor misleading." (*Samaniego*, *supra*, 172 Cal.App.4th at p. 1168.)

We reiterate that CALCRIM No. 1403 states in no uncertain terms that gang evidence is inadmissible to prove character or that the defendant is a bad person or has a criminal propensity. It allows such evidence to be considered only on the issues germane to the gang-related crimes and enhancements. (*Samaniego*, *supra*, 172 Cal.App.4th at p. 1168; cf. also *People v*. *Garcia*, *supra*, 168 Cal.App.4th at p. 275; *People v*. *Martinez*, *supra*, 113 Cal.App.4th at p. 413.) Thus, evidence of SSP's claimed territory, the gang's

primary activities, notions of gang loyalty, respect, and backup were all relevant to determine defendant's intent with respect to the charged crimes and his claim of heat of passion.

As the instruction has been held to be "neither contrary to law nor misleading" (*Samaniego*, *supra*, 172 Cal.App.4th at p. 1168), defense counsel cannot be faulted for stipulating to its being given.

Furthermore, the jury's willingness to acquit defendant of first degree murder belies his argument that the prosecution's evidence of his gang affiliation, and thus, purportedly, of his bad character, improperly contributed to the jury's conclusion that he had not acted in the heat of passion upon sufficient provocation when he stabbed Esparza. The acquittal strongly indicates that the gang evidence was not used by the jury for an improper purpose as defendant contends. Moreover, as discussed, the jury was expressly instructed not to conclude from the gang evidence "that the defendant is a person of bad character or that he has a disposition to commit the crime." (CALCRIM No. 1403.) We must presume the jury understood and followed the court's limiting instruction. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139 [we and others have described the presumption that jurors understand and follow instructions as the crucial assumption underlying our constitutional system of trial by jury].)

Simply put, had the jury used the gang evidence as defendant asserts, it would not have acquitted him of first degree murder. Defendant's argument that his counsel was ineffective in failing to request a modification of CALCRIM No. 1403 fails under both prongs of *Strickland*.

Failing to Object to Officer Gallardo's Testimony on Confrontation Clause Grounds

As can be seen, in his appeal defendant claimed that admitting Officer Gallardo's testimony violated his right to confront adverse witnesses. Specifically, defendant argued that the court violated his Sixth Amendment right to confront witnesses against him by admitting testimonial hearsay. Defense counsel did not object on confrontation clause

grounds and thus defendant raised the issue of ineffective assistance of counsel. However, as noted *ante*, the merits of the issue were considered in the appeal. (*People v. Neely*, *supra*, 176 Cal.App.4th at p. 795 [an appellate court may choose to consider the case on the merits when a claim of ineffectiveness of counsel is raised].)

In his petition, defendant argues that assuming his counsel's failure to object forfeited the issue, he received ineffective assistance of counsel. Since we have addressed the merits of the argument in the appeal, this claim of ineffective assistance of counsel is moot.

Failure to Request a Jury Instruction

As can be seen, in his appeal, defendant claimed that he received ineffective assistance of counsel because his attorney failed to request a jury instruction that the hearsay recited by Officer Gallardo could be considered only to assess the validity of his opinions and not for its truth. Defense counsel acknowledges that she did not request such an instruction because the jury was instructed pursuant to CALCRIM No. 360 that the statements made to experts could be considered only to evaluate the expert's opinion and not for their truth. This acknowledgement does not change our analysis as set forth *ante*.

In sum, defendant failed to carry his burden in the appeal that he was prejudiced by his counsel's failure to request an instruction that the jury could consider the hearsay recited by Officer Gallardo only to assess the validity of his opinions and not for its truth. Nothing he says in his petition for writ of habeas corpus changes that conclusion.

Finally, defendant makes a cumulative error argument, which he asserts compels reversal of his conviction. He asserts that he has shown that his trial counsel unreasonably stipulated to an incorrect instruction concerning gang evidence, failed to object on confrontation clause grounds to testimonial hearsay introduced by the prosecution's gang expert, and failed to request that the jury be instructed not to consider the hearsay introduced by the prosecution's gang expert for its truth.

Since, contrary to his assertions, we have found none of defendant's claims of error meritorious and/or prejudicial, a cumulative error argument cannot be sustained. We repeat that no serious errors occurred, which whether viewed individually or in combination, could possibly have affected the jury's verdict. (*People v. Martinez, supra*, 31 Cal.4th at p. 704; *People v. Valdez, supra*, 32 Cal.4th at p. 128.)

Disposition

The judgment is affirmed. The petition for writ of habeas corpus is denied.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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WALSH, J.[*]

The People v. Perez; *Perez on Habeas Corpus*
H039349; H042098

[*]Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution